UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

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| HOSPITALITY MINTS, INC.<br>213 CANDY LANE<br>BOONE, NC 28607,<br><br>Plaintiff,<br><br>v.<br><br>STEWART CANDY COMPANY<br>600 HAINES AVENUE<br>WAYCROSS, GA 31501,<br><br>Defendant. | Civil Action No.<br><br>(JURY TRIAL DEMANDED) |

**COMPLAINT**

For its complaint, Plaintiff, Hospitality Mints, Inc. (herein "Plaintiff"), alleges and avers as follows:

**NATURE OF ACTION**

This is a civil action against Plaintiff's competitor, defendant Stewart Candy Company (herein "Defendant"). Defendant has recently launched a new lower-quality mint in packaging that is a copy of the packaging Plaintiff has used for its high-quality buttermints for over twenty-five years. As set forth below, the unlawful acts of Defendant constitute federal unfair competition and false designation of origin, violations of the North Carolina Unfair and Deceptive Trade Practices Act, common law unfair competition, and unjust enrichment. Plaintiff seeks monetary and injunctive relief.

## PARTIES

1. Plaintiff is, and at all times material hereto has been, a commercial organization organized and existing under the laws of the State of North Carolina. Plaintiff's business is located at 213 Candy Lane, Boone, North Carolina 28607.

2. Upon information and belief, Defendant is a Georgia company, having a place of business located at 600 Haines Avenue, Waycross, Georgia 31501.

## JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction of this matter pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338 and 1367.

4. This Court has personal jurisdiction over the Defendant consistent with the principles underlying the U.S. Constitution and N.C. Gen. Stat. § 1-75.4.

5. More specifically, on information and belief, Defendant is subject to the personal jurisdiction of this Court, and the Court's exercise of such jurisdiction over it comports with due process. On information and belief, Defendant is subject to general personal jurisdiction in this judicial district because it regularly does business in the State of North Carolina and this judicial district and has maintained systematic and continuous contact with North Carolina and North Carolina residents in this judicial district through the marketing and sale of products in North Carolina and in this judicial district. In the alternative, and again on information and belief, Defendant is subject to the personal jurisdiction of this Court by virtue of the North Carolina long-arm statute inasmuch as Defendant, acting directly or through an agent, has caused the events giving rise to the claims asserted herein to occur by virtue of: (a) Defendant's transaction of business in North Carolina and this judicial district; (b) Defendant's causing tortious injury in the State of North Carolina by an act or omission in the state; or (c) Defendant's causing tortious

injury to Plaintiff in the State of North Carolina by an act or omission outside the state while otherwise engaging in other persistent conduct in the state or deriving substantial revenue from goods used or services rendered in the state.

6. On information and belief, Defendant's products are offered for sale to customers residing in this State and District and have been sold to customers in this State and District.

7. On information and belief, Defendant has voluntarily and purposefully placed its products into the stream of commerce with the expectation that they will be purchased and/or used in this State and District.

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1391(c) because Defendant transacts and does business in this district, and a substantial part of the events giving rise to this action occurred in this district.

## FACTS

### Plaintiff's Distinctive Thank You Trade Dress

9. Plaintiff has been making mints every day in Boone, North Carolina since 1976.

10. As the largest supplier of custom mints in the U.S., Plaintiff produces and sells more than 1.6 billion mints annually.

11. In addition to custom mints, for over twenty-five years, Plaintiff has offered buttermints in the packaging shown below (herein the "Thank You Trade Dress"):

12. Sales of mints in the Thank You Trade Dress account for approximately fifteen percent (15%) of Plaintiff's sales.

13. Plaintiff conservatively estimates it has sold more than four *billion* mints in the Thank You Trade Dress. The vast majority of such sales have been in the United States. (Based on public population figures, that equals more than ten mints in the Thank You Trade Dress, for *every person* in the United States.)

14. Plaintiff's mints sold in the Thank You Trade Dress have always been made with pride in North Carolina. Plaintiff presently employs more than one-hundred candy makers.

15. Plaintiff's mints sold in the Thank You Trade Dress are of uniquely high quality. They contain real butter and have a unique, smooth flavor and pleasant mouth feel.

16. Plaintiff's mints sold in the Thank You Trade Dress are sold through several channels, including restaurant operators and restaurant supply distributors. A significant source of revenue for Plaintiff is also derived from the sale of mints directly to consumers, through traditional retailers such as Wal-Mart, OfficeMax and Office Depot, and online retailers such as www.amazon.com.

17. Plaintiff's mints sold in the Thank You Trade Dress are particularly important to Plaintiff's business, because once customers recognize and are pleased with the high quality of these buttermints, they often go on to place orders for custom mints from Plaintiff. As such, protecting the high-quality reputation of Plaintiff's buttermints sold in the Thank You Trade Dress is extremely important to protecting all of Plaintiff's business.

18. Plaintiff has invested substantial amounts of time and effort in developing, establishing, and promoting the Thank You Trade Dress.

19. Plaintiff's mints in the Thank You Trade Dress are advertised and sold within this District and elsewhere throughout the United States.

20. As a result of the continuous and systematic usage of the Thank You Trade Dress to identify the high-quality buttermints sold by Plaintiff, Plaintiff has established an exclusive association in the public's mind with the Thank You Trade Dress as a designation of origin associated with Plaintiff's products.

21. The Thank You Trade Dress has significance in the minds of the purchasing public as denoting goods coming from a single source, the Plaintiff.

22. The Thank You Trade Dress has become distinctive as an indicator of the products made and sold by a single source, the Plaintiff.

23. There is a substantial demand for products associated with the Thank You Trade Dress and, therefore, the goodwill and right to sell products under this mark are valuable commercial property rights.

24. The Thank You Trade Dress and the goodwill associated with it is of inestimable value to Plaintiff.

**Defendant's Conduct**

25. On or around Saturday, May 20, 2017, while attending the National Restaurant Association Convention, one of Plaintiff's account managers found a mint in the packaging pictured below (herein the "Infringing Packaging"):

26. The mint shown above was offered and promoted by Defendant at the National Restaurant Association Convention.

27. On Tuesday, May 24, additional samples of mints in the Infringing Packaging were found at Defendant's booth at the National Restaurant Association Convention.

28. At the Sweets and Snacks Convention, on Tuesday, May 24 and Wednesday, May 25, yet additional samples of mints in the Infringing Packaging were found at Defendant's booth.

29. At its booth at the National Restaurant Association Convention, Defendant also offered presentation materials, containing marketing material and pricing, including a photograph of the mints in the Infringing Packaging.

30. As can be seen in the side-by-side comparison below, the Defendant's Infringing Packaging (on the right) is a blatant knock-off of Plaintiff's Thank You Trade Dress (on the left):

Hospitality Mints

Stewart Candy

31. Further, as can be seen and also observed in person, Defendant's packaging is of inferior quality. As an example, the ink in the "Y" has partially rubbed off.

32. Otherwise, Defendant's Infringing Packaging is essentially identical to Plaintiff's Thank You Trade Dress. Defendant's Infringing Packaging includes all the distinctive elements of Plaintiff's Thank You Trade Dress, including, *e.g.,* the same angle of the font, the capital "T" and capital "Y," the same black line broken by the bottom half of the "Y," the same continuous

green line under the black line, the green leaf, the position of the green leaf angling off of the "Y," the white wrapper, the serrated edges, and the size and placement of the font, lines and leaf in relation to the package size.

33. Plaintiff's Thank You Trade Dress is not functional. Defendant had many other options in determining how to package its mints, but instead chose to copy the distinctive aspects of Plaintiff's Thank You Trade Dress.

34. Further, the pricing tiers, wrappers and information shown in Defendant's sales materials are the same as Plaintiff has offered for many years.

35. Moreover, although the mints inside Defendant's Infringing Packaging appear to be the same buttermints that Plaintiff sells in the Thank You Trade Dress, the mints are *not* of equal quality.

36. Unlike Plaintiff's high-quality, creamy buttermints, Defendant's mints are crunchy and chalky, and have a different flavor profile.

37. Further, although Defendant's marketing materials repeatedly refer to Defendant's products as "butter mints," on information and belief, the mints inside Defendant's Infringing Packaging do not contain any butter.

38. As a result of the foregoing, customers are likely to perceive Defendant's mints in the Infringing Packaging as an inferior product.

39. On information and belief, in addition to copying Plaintiff's Thank You Trade Dress, Defendant is purposefully imitating Plaintiff's entire sales strategy, all in an effort to unfairly compete with Plaintiff and replace Plaintiff in the market by selling a lesser quality, imitation product.

**Defendant's Prior Knowledge of Plaintiff's Rights**

40. From approximately 2005-2015, Lester Adams was an employee of Plaintiff.

41. As an employee of Plaintiff, Mr. Adams was very familiar with Plaintiff's Thank You Trade Dress, the goodwill associated with such trade dress, and its value to Plaintiff.

42. On information and belief, on or around 2015, Mr. Adams left Plaintiff's employment and joined the employment of Defendant.

43. While Defendant has sold candy for a number of years, to Plaintiff's knowledge, Defendant never offered buttermints as a product line prior to Defendant's employment of Mr. Adams.

44. On information and belief, Mr. Adams was involved in Defendant's selection and adoption of the Infringing Packaging, and such selection and adoption was done with intent to trade off of the goodwill associated with Plaintiff's Thank You Trade Dress, and/or to cause mistake or deception as to the affiliation, connection or association of Defendant's mints with Plaintiff's mints, and/or otherwise to unfairly compete with Plaintiff and unjustly enrich the Defendant.

**FIRST CLAIM FOR RELIEF**
**(False Designation of Origin, Trade Dress Infringement and False Advertising Pursuant to § 43(a) of the Lanham Act (15 U.S.C. § 1125(a))**

45. Plaintiff repeats and realleges each and every paragraph set forth above as if fully set forth herein.

46. Plaintiff's Thank You Trade Dress is inherently distinctive and/or had acquired secondary meaning among consumers prior to the introduction of Defendant's Infringing Packaging.

47. Defendant's goods and Plaintiff's goods are both mints. Further, on information and belief, both parties' mints are sold through the same channels of distribution and are marketed through the same channels. Accordingly, Defendant's activities are likely to cause

confusion in the trade and among the general public as to at least the origin or sponsorship of Defendant's goods and services as they relate to Plaintiff.

48. Defendant has directly used in connection with its advertisement, offers for sale, and sale of its Infringing Packaging, false designations of origin and false designations, including words or other symbols and trade dress which tend to falsely describe or represent such goods and have caused such goods to enter into commerce with full knowledge of the falsity and deceptiveness of such designations of origin, all to Plaintiff's detriment.

49. Upon information and belief, Defendant is passing off its mints, including the Infringing Packaging, as those of Plaintiff, or otherwise unfairly imitating Plaintiff's Thank You Trade Dress. Such conduct is likely to cause confusion and mistake in the minds of the purchasing public as to the source of Defendant's mints and/or the affiliation of Defendant and Plaintiff, and to cause consumers to believe Defendant's mints originate from, are provided by, or are endorsed or sponsored by Plaintiff when, in fact, they are not.

50. Upon information and belief, Defendant is holding out its products sold in the Infringing Packaging as buttermints, when in fact, they contain no butter.

51. Defendant's acts, including its use of the Infringing Packaging and imitation of the Thank You Trade Dress in connection with Defendant's mints, as set forth above, constitutes use in commerce which is likely to cause confusion, or cause mistake, or to deceive the public as to the affiliation, connection, or association of Defendant with Plaintiff, or as to the origin, sponsorship, or approval of Defendant's goods or commercial activities by Plaintiff, in violation of 15 U.S.C. § 1125(a).

52. The acts of Defendant complained of herein also constitute an attempt to trade on the goodwill which Plaintiff has developed in connection with the Thank You Trade Dress to the detriment of Plaintiff.

53. On information and belief, Defendant's acts of trade dress infringement complained of herein were intended to cause and have caused confusion and deception of the public, misleading prospective purchasers, distributors and retailers as to the true source, connection, sponsorship, affiliation, association, or approval of Defendant's products.

54. As a result of its activities, Defendant has committed and is continuing to commit trademark infringement, unfair competition, false designation of origin, unfair competition and unfair trade practices, and these acts are willful, deliberate and are being committed with prior notice and knowledge of Plaintiff's rights.

55. Plaintiff is without an adequate remedy at law, in that damages are difficult to ascertain. Further, because of the inferior quality of the Infringing Packaging, Defendant's conduct is likely to cause irreparable damage to Plaintiff's reputation and goodwill, which has been built through over twenty-five years of consistently offering a high-quality, 100% Made in USA, product.

56. As a result of Defendant's acts of trade dress infringement as alleged above, Plaintiff has suffered and will continue to suffer irreparable harm in the form of damage and injury to their business, reputation and goodwill, and will sustain serious loss of revenues and profits, and will continue to do so unless Defendant is preliminarily and permanently restrained and enjoined by the Court from further violating Plaintiff's rights.

## SECOND CLAIM FOR RELIEF
**(Unfair or Deceptive Trade Practices Under North Carolina Gen. Stat. § 75-1.1)**

57. Plaintiff repeats and realleges each and every paragraph set forth above as if fully set forth herein.

58. The conduct of Defendant complained of herein, and specifically, without limitation, Defendant's use of trademarks and/or trade dress in connection with Defendant's goods, false statements, and use of sales materials and sales strategies that imitate those of Plaintiff, constitutes one or more deceptive trade practices in violation of N.C.G.S. § 75-1.1 *et seq*.

59. Defendant's conduct either causes a likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services and/or causes a likelihood of confusion or misunderstanding as to affiliation, connecting, or association with, or certification by another, and or causes a likelihood of confusion as to the nature or quality of Defendant's goods.

60. As a direct and foreseeable consequence of the actions alleged herein, Defendant is liable to Plaintiff for the actual damages incurred as a result of the deceptive practices.

61. Defendant's use of confusingly similar packaging, indicia and trademarks has caused or will cause Plaintiff to suffer economic loss and Defendant has gained or is likely to gain a profit as a consequence thereof in amounts not yet determined.

62. Defendant has engaged and continues to engage in willful and wanton activity, demonstrating a conscious and intentional disregard of and indifference to the rights of Plaintiff which Defendant knew or should have known was reasonably likely to result in injury, damages, and harm to Plaintiff.

63. Plaintiff is entitled to recover actual damages from Defendant, plus treble the amount fixed by any verdict pursuant to N.C.G.S. § 75-16.

64. Plaintiff is entitled to recover its reasonable costs and attorneys' fees pursuant to N.C.G.S. § 75-16.1.

65. The manner and amount of damage to Plaintiff likely to be caused by the infringing activity of Defendant's complained of herein cannot be fully measured or compensated in economic terms, and so cannot be adequately remedied at law. As a result, Plaintiff will suffer irreparable harm and this irreparable harm will continue unless Defendant's infringing activities are enjoined during the pendency of this action and thereafter.

**THIRD CLAIM FOR RELIEF**
**(Common Law Unfair Competition)**

66. Plaintiff repeats and realleges each and every paragraph set forth above as if fully set forth herein.

67. The acts and conduct of Defendant alleged herein create a likelihood of confusion between Defendant and Plaintiff, and constitute intentional and willful unfair competition pursuant to North Carolina common law.

68. Defendant's actions are in or affecting commerce.

69. Defendant's actions proximately caused actual injury to Plaintiff.

70. Defendant has engaged and continues to engage in this willful and wanton activity, demonstrating a conscious and intentional disregard of and indifference to the rights of Plaintiff which Defendant knew or should have known was reasonably likely to result in injury, damages, and harm to Plaintiff so as to justify the assessment of punitive damages against it, in an amount to be determined at trial.

71. Defendant's acts of infringement, unless enjoined by this Court, will continue to cause Plaintiff to sustain irreparable damage, loss and injury, for which Plaintiff has no adequate remedy at law.

## **FOURTH CLAIM FOR RELIEF**
**(Unjust Enrichment)**

72. Plaintiff repeats and realleges each and every paragraph set forth above as if fully set forth herein.

73. By wrongfully using the Infringing Packaging, Defendant received the benefit of Plaintiff's marketing efforts, goodwill, and reputation associated with the Thank You Trade Dress and business identity.

74. Defendant's retention of these benefits would be inequitable without requiring Defendant to pay the value thereof.

75. By wrongfully receiving the benefit of Plaintiff's marks, and imitating Plaintiff's product and sales strategy, Defendant has been unjustly enriched to the detriment of Plaintiff, which has no adequate remedy at law.

76. Defendant has engaged and continues to engage in this willful and wanton activity, demonstrating a conscious and intentional disregard of and indifference to the rights of Plaintiff which Defendant knew or should have known was reasonably likely to result in injury, damages, and harm to Plaintiff so as to justify the assessment of punitive damages against them, in an amount to be determined at trial.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands that:

(a) Defendant, its agents, servants, employees, attorneys, representatives, successors and assigns and all persons, firms, or corporations in active concert or participation with Defendant be enjoined and restrained preliminarily and permanently from:

(1) directly or indirectly infringing the Thank You Trade Dress in any manner, including generally, but not limited to manufacturing, distributing, advertising, selling, or offering for sale and distribution any goods which infringe said trade dress;

(2) using any trademark, trade name, logo, or design that tends falsely to represent that, or is likely to confuse, mislead or deceive purchasers, Defendant's customers, and other members of the public that Defendant's mints or their goods originate from Plaintiff or that Defendant's goods have been sponsored, approved, or licensed by, or are associated with Plaintiff or are in some way connected or affiliated with Plaintiff;

(3) using any other mark, name, domain name, email address, designation, or indicia of origin that is confusingly similar to the Thank You Trade Dress;

(4) engaging in any conduct which tends falsely to represent, or is likely to confuse, mislead or deceive purchasers, Defendant's customers, and other members of the public to believe that Defendant is connected with Plaintiff or is sponsored, approved, or licensed by Plaintiff or is in some way connected or affiliated with Plaintiff;

(5) falsely or misleading representing the nature, characteristics, or qualities of its products and services

(6) otherwise competing unfairly with Plaintiff in any manner;

(b) Defendant be found to have unfairly competed and infringed Plaintiff's Thank You Trade Dress in violation of Federal and North Carolina law;

(c) Defendant be found to have been unjustly enriched;

(d) Defendant be ordered, pursuant to 15 U.S.C. § 1118, to deliver up to Plaintiff for destruction all goods, labels, signs, prints, packages, wrappers, promotional materials, forms, and advertisements in the possession of Defendant bearing the Infringing Packaging or images thereof or any other mark or indicia of origin that is confusingly similar to the Thank You Trade Dress;

(e) Defendant be ordered to recall all infringing goods sold and to issue written notices to all those previously offered goods in the Infringing Packaging, and those to whom the infringing mints have been sold, notifying them of the injunction;

(f) Defendant be ordered to disseminate corrective advertising, at Defendant's expense and upon Plaintiff's approval, that informs consumers, the restaurant trade and the public of Defendant's unlawful conduct and of the judgment requiring Defendant to cease such unlawful conduct;

(g) Defendant be ordered to file with this Court and to serve upon Plaintiff, within 30 days after the entry and service on Defendant of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;

(h) An accounting be directed to determine Defendant's profits resulting from its activities and that such profits be paid over to Plaintiff, increased as the Court finds to be just under the circumstances of this case;

(i) Plaintiff recover all damages it have sustained as a result of Defendant's activities and that said damages be trebled;

(j) Plaintiff recover exemplary damages;

(k) Plaintiff recover from Defendant Plaintiff's costs of this action, reasonable counsel fees, and prejudgment and postjudgment interest; and

(l) Plaintiff have all other and further relief as the Court may deem just and proper under the circumstances.

Dated: May 30, 2017

Respectfully submitted,

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PLAINTIFF'S DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a jury trial.

Dated: May 30, 2017

Respectfully submitted,

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